No. 82-2056

In the Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, ET AL., PETITIONERS

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA BANDS OF MISSION INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR

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QUESTIONS PRESENTED

1. Whether, in issuing a license for a hydroelectric project that utilizes federal reservation lands, pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), the Federal Energy Regulatory Commission may modify or reject license conditions deemed "necessary for the adequate protection and utilization" of the reservation by the Secretary with supervisory authority over the reservation.

2. Whether the Commission's obligations under Section 4(e) to make a finding of no interference or inconsistency with the reservation's purpose before issuing a license, and to include in the license the Secretary's conditions for the protection and utilization of the reservation, extend to reservations that are situated directly downstream from a hydroelectric project and whose reserved water rights will be affected by the project.

3. Whether Section 8 of the Mission Indian Relief Act, ch. 65, 26 Stat. 714, requires a Commission licensee whose hydroelectric project is designed to convey water across Mission Indian reservation lands to obtain right-of-way permits from the Bands whose reservations are traversed by the water conveyance facilities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulation:

Statutes and regulation—Continued: Page

Statutes and regulation—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

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STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, 16 U.S.C. 791a *et seq.*, and the Mission Indian Relief Act, ch. 65, 26 Stat. 712 *et seq.*, are set forth in an appendix to this brief at 1a-10a, *infra*.

STATEMENT

The legal issues in this case arise in the context of a decision by the Federal Energy Regulatory Commission [1] to issue a license permitting the Escondido Mutual Water Company, the City of Escondido and the Vista Irrigation District to operate a small hydroelectric project (Project No. 176) near Escondido, California. As the Commission recognized (Pet. App. 132, 338), however, the principal function of Project No. 176 is not to generate power, but to serve as a water conveyance facility for diverting water

[1] The term "Commission" refers to the Federal Power Commission prior to October 1, 1977, and to the Federal Energy Regulatory Commission thereafter.

from the San Luis Rey River watershed to the Escondido and Vista service areas for municipal and agricultural uses. This case has a long and complicated history, to which we now turn.

A. Historical Background

1. The San Luis Rey River originates near Palomar Mountain in northern San Diego County, California. In its natural condition, it flows through the La Jolla, Rincon and Pala Indian Reservations and then through the City of Oceanside on its way to the Pacific Ocean. Three other Indian reservations—the Pauma, the Yuima (which is under the jurisdiction of the Pauma Band) and approximately three quarters of the San Pasqual—also are within the watershed. (A general map of the area and of Project No. 176 is reproduced at Pet. App. 30 and 308).

The San Luis Rey River watershed is now and historically has been the homeland of the La Jolla, Rincon, Pauma, Pala, and Yuima Indians. The severe plight of these and other Mission Indians of Southern California was brought to the attention of the Nation and Congress in a report prepared in 1883 by two Interior Department officials, Helen Hunt Jackson and Abbot Kinney. S. Exec. Doc. 49, 48th Cong., 1st Sess. 7-37 (1884), *reprinted in* S. Rep. 74, 50th Cong., 1st Sess. (1888). See also H.R. Rep. 3282, 50th Cong., 1st Sess. (1888). The report described the egregious conditions under which the Indians were living and observed that "their history has been one of almost incredible long-suffering and patience under wrongs." S. Exec. Doc. 49, *supra*, at 8-9. Jackson and Kinney recommended that land with safe and secure boundaries be set aside for each band or village of Mission Indians and that all non-Indians living within the reservations be removed. They also recommended that patents be issued for whatever lands were eventually set aside so as to insure the permanence of Indian ownership.

The Jackson-Kinney report led the Department of the Interior to submit a proposed bill to Congress in 1884 for the relief of the Mission Indians. The bill, as amended,

was eventually enacted as the Mission Indian Relief Act of 1891 (MIRA), ch. 65, 26 Stat. 712 *et seq.* The concerns that led to the enactment of MIRA were summarized in the Senate Report (S. Rep. 74, *supra*, at 1, 3 (quoted at Pet App. 4)):

> The history of the Mission Indians for a century may be written in four words: conversion, civilization, neglect, outrage. The conversion and civilization were the work of the mission fathers previous to our acquisition of California; the neglect and outrage have been mainly our own. Justice and humanity alike demand the immediate action of Government to preserve for their occupation the fragments of land not already taken from them.
>
> * * * * *
>
> Much of the land is valueless without irrigation, and the Indians are being deprived of their water rights wherever and whenever the interests of the whites demand the appropriation of such rights.

See H.R. Rep. 3251, 51st Cong., 2d Sess. 1, 2-3 (1890).[2] In short, "[t]he Mission Indians had deserved well and had fared badly and Congress passed the Mission Indian Relief Act of 1891 for their particular redress." *Arenas* v. *United States*, 322 U.S. 419, 421 (1944) (footnotes omitted).

Pursuant to the provisions of MIRA, the La Jolla, Rincon, San Pasqual and Pala Reservations were with-

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[2] The House Report included the following observations with respect to the plight of the Mission Indians (H.R. Rep. 3251, *supra*, at 3-4 (emphasis added)):

> Never before in any other Indian agency have I heard so many cases of complaint concerning land claims, land extortion, land stealing, shifting of lines, unknown boundaries, invasion of reservations, crowding back the Indians upon the mountains, *infringement upon water rights*, etc. * * *
>
> Encroaching white men should be put off from lands belonging to Indians. *The stealing of water from the Indians should be stopped* * * *.

See also H.R. Rep. 2556, 49th Cong., 1st Sess. 1-2 (1886); 22 Cong. Rec. 806-807 (1890).

drawn from settlement and entry by order of President Harrison on December 29, 1891. Trust patents were issued in 1892 for the La Jolla and Rincon Reservations, in 1893 for the Pala Reservation, and in 1910 for the San Pasqual Reservation. The Pauma and Yuima Reservations were also established in accordance with MIRA through the acquisition of quitclaim deeds by the United States in 1891 and 1893. Although MIRA originally called for the land to be held in trust for 25 years followed by the issuance of fee patents, the periods of trust were later extended indefinitely. Pet. App. 4.

2. Since 1895, the Escondido Mutual Water Company (Mutual) and its predecessor in interest have diverted the waters of the San Luis Rey River out of the watershed to the community in and around the City of Escondido. The point of diversion is located within the La Jolla Indian Reservation at a point upstream from the other reservations. The conveyance facility, known as the Escondido Canal, traverses parts of the La Jolla, Rincon, and San Pasqual Indian Reservations, as well as some private lands and federal lands administered by the Bureau of Land Management. The canal terminates at Lake Wohlford, an artificial storage facility. Pet. App. 4-5.

Various agreements and permits dating back to 1894 purportedly grant rights-of-way across certain reservation lands, and also provide that specified quantities of water are to be supplied to some of the reservations (Pet. App. 49-58; J.A. 9-38). The meaning and validity of those agreements is the subject of separate proceedings instituted by the Bands (and subsequently joined by the United States) in the United States District Court for the Southern District of California. *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, Nos. 69-217-S, 72-276-S & 72-271-S.[3]

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[3] In their complaint, the Bands sought (1) a declaratory judgment that the rights-of-way agreements are void; (2) an injunction prohibiting diversion of the waters of the San Luis Rey River into the Escondido Canal; and (3) substantial damages. On January 10,

In 1915, Mutual constructed the Bear Valley powerhouse, which is located downstream from Lake Wohlford and which generates power with water released from that lake; the Bear Valley powerhouse has a capacity of 520 kilowatts (kw) (Pet. App. 53 & n.24). In 1916, Mutual completed construction of the Rincon powerhouse, which is located on the Rincon Reservation and which generates power with water from the Escondido Canal; the Rincon powerhouse has a capacity of 240 kw (*id.* at 53). Thus, the combined capacity of both plants is less than one megawatt. In 1922, the predecessor of Vista Irrigation District (Vista) constructed Henshaw Dam on the San Luis Rey River, approximately nine miles upstream from Mutual's diversion dam. Pursuant to a complex contractual relationship, Vista and Mutual have shared the output of both Lake Henshaw and a well field located above Lake Henshaw, and the use of the Escondido Canal (*id.* at 56-58).

In 1921, following enactment of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 *et seq.* (now codified as Part I of the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*), Mutual applied to the Commission for a license covering its project. In 1924, the Commission issued a 50-year license to Mutual covering the Escondido diversion dam and canal, Lake Wohlford, and the Rincon and Bear Valley powerhouses (but not Vista's Henshaw facilities).[4]

1980, the district court entered an order granting partial summary judgment in favor of the Bands and voiding portions of the disputed contracts. The court of appeals refused to permit an interlocutory appeal of that order, and the case remains pending before the district court (Pet. App. 7). On December 10, 1980, the district court entered a further order granting partial summary judgment in favor of the Bands with respect, inter alia, to certain water rights issues. We are lodging copies of the district court's opinions with the Clerk of the Court.

[4] Mutual's license expired in 1974. Since then, it has operated Project No. 176 under annual licenses issued pursuant to Section 15(a) of the FPA, 16 U.S.C. 808(a).

Since 1925, Mutual and Vista have captured and impounded approximately 90% of the flow of the San Luis Rey River at the diversion dam on the La Jolla Reservation, and have diverted those waters to Lake Wohlford. The total amount of water diverted out of the watershed averages approximately 14,000 acre-feet per year. Natural flow accounts for only 705 acre-feet of the average annual diversion, the remainder consisting of water stored in Lake Henshaw and water pumped from the groundwater basin above Lake Henshaw (Pet. App. 6). Both Escondido and Vista have available alternative supplies of water from sources other than the San Luis Rey River (Pet. App. 125-126, 182).

Approximately ten percent of the diverted flow, an average of 1,500 acre-feet per year, has been delivered to the Rincon Reservation pursuant to a contract entered into by the Secretary of the Interior on behalf of the Rincon Band in 1914. No project water has been delivered to any of the other reservations (Pet. App. 6), although all the reservations include several thousand acres of as yet undeveloped irrigable lands whose natural source of supply is the San Luis Rey River (*id.* at 132-133, 139-141, 177-182, 185-186).

Between 1894 and 1957, none of the Bands received any compensation for the use of its lands or for the diversion of the river. Since 1957, the San Pasqual Band has received $25 per year in annual charges[5] for the use of about three acres of tribal lands licensed in that year. Pet. App. 7.

B. The Proceedings Before the Commission

1. In 1969 and 1970, the Secretary of the Interior and the La Jolla, Rincon and San Pasqual Bands filed complaints with the Commission, alleging that Mutual and Vista had violated the provisions of Mutual's 1924 li-

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[5] Annual charges are the sums paid by a licensee for use of reservation lands pursuant to the provisions of Section 10(e) of the FPA, 16 U.S.C. 803(e).

cense. They sought, inter alia, increased annual charges to the Bands through the term of the license. In response, the Commission initiated an investigation pursuant to Section 4(g) of the FPA, 16 U.S.C. 797(g).

In April 1971, Mutual (subsequently joined by the City of Escondido) filed an application with the Commission for a new "minor" hydroelectric license[6] for Project No. 176. In its application, Mutual proposed to continue operating the project as it had during the original license period.

In 1972, the Secretary requested the Commission to recommend federal takeover of Project No. 176, pursuant to Section 14(b) of the FPA, 16 U.S.C. 807(b) after expiration of the original license.[7] Additionally, the La Jolla, Rincon, and San Pasqual Bands, acting pursuant to Section 15(b) of the FPA, 16 U.S.C. 808(b), applied for a nonpower license, under the supervision of Interior, to take effect when the original license expired.[8] The Pauma and Pala Bands subsequently joined in this application. Under both Interior's federal takeover proposal and the Bands' application for a nonpower license, the licensed project facilities would be used for the economic development, primarily agricultural and recreational, of the reservations.

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[6] Section 10(i) of the FPA, 16 U.S.C. 803(i), authorizes the Commission to waive certain conditions and requirements in issuing a minor license for a complete project with a capacity not exceeding 2,000 horsepower (which is the equivalent of 1,500 kw).

[7] Section 14(b) of the FPA authorizes the Commission to recommend to Congress that the federal government take over a project following expiration of the project's license. If Congress enacts legislation to that effect, the project is operated by the government upon payment to the original licensee of its net investment in the project and certain severance damages. See Pet. App. 312-327.

[8] Section 15(b) of the FPA authorizes the Commission to grant a license for use of a project as a "nonpower" facility if it finds the project no longer is adapted to power production. In that event, the new licensee must make the same payments to the original licensee that are required of the United States pursuant to Section 14(b).

2. After extensive hearings, an administrative law judge (ALJ) concluded that Project No. 176 is not subject to the Commission's licensing jurisdiction because the power aspects of the project are insignificant in comparison to the project's primary purpose of conveying water for domestic and irrigation consumption (J.A. 357-368). The ALJ emphasized that "[t]he horsepower generated by the entire project is not even the equivalent to that produced by a half dozen modern automobiles" (J.A. 358 (footnote omitted)). The ALJ accordingly recommended dismissal of all Commission proceedings relating to Project No. 176.

3. The Commission reversed the ALJ's decision (Pet. App. 42-378). The Commission first held that it had jurisdiction over the project despite the small amount of electric power generated by the project and the relative insignificance of that power as compared to the project's water conveyance function (*id.* at 74-78).

With regard to the past operation of Project No. 176, the Commission found that Mutual had violated its license by permitting Vista's joint use of project facilities and by diverting water stored in the Lake Henshaw reservoir and pumped from above that reservoir through the Escondido Canal (Pet. App. 226-228). It awarded readjusted annual charges to the La Jolla and Rincon Bands as of September 1969, and to the San Pasqual Band as of May 1970, in amounts based on the operations authorized by the 1924 license (*id.* at 232-234).[9]

The Commission denied Interior's recommendation for federal takeover of Project No. 176 and the Bands' application for a nonpower license (Pet. App. 92-116). Instead, it granted a new 30-year license to petitioners Mutual, the City, and Vista. Although Vista had not applied for a license with Mutual, the Commission deter-

[9] The Commission held, however, that any retroactive compensation for use of reservation lands other than as authorized by Mutual's 1924 license must be sought in federal district court (Pet. App. 230).

mined that it should be made a joint licensee because its Henshaw facilities are an integral part of the project (*id.* at 80-86). Having decided to include the Henshaw facilities in the project license, the Commission treated the proceedings as an application for an initial license, rather than as a relicensing pursuant to Section 15 of the FPA, 16 U.S.C. 808 (Pet. App. 133-137 & n.136).

The Commission included certain conditions in the new license designed to satisfy the requirements of Sections 4(e) and 10(a) of the FPA, 16 U.S.C. 797(e) and 803(a), that the license "not interfere or be inconsistent" with the purposes for which the Indian reservations were created and that the project be the one "best adapted to a comprehensive plan" for the development of the San Luis Rey River (Pet. App. 133, 185).[10] Specifically, the Commission required development of a permanent water operating plan (*id.* at 171) and delivery of certain quantities of water to the La Jolla, Rincon, and San Pasqual Reservations for domestic, agricultural, and commercial uses (*id.* at 187).[11] The Commission did not impose similar conditions for the benefit of the Pala, Pauma and Yuima Reservations, which are located directly downstream from the project, because it concluded that Section 4(e) applies only to reservations that are physically occupied by the project facilities (Pet. App. 138), and that "insufficient water is available to satisfy all bene-

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[10] In including these conditions, the Commission found that the original license for Project No. 176 interfered and was inconsistent with the purposes for which the La Jolla and Rincon Reservations were established (Pet. App. 176-182). The Commission noted (*id.* at 176) that these reservations

> were created for the purpose of providing permanent homes for the members of those respective Bands where they can be economically self-sufficient. The concept of economic self-sufficiency requires that the * * * reservations have adequate supplies of water for domestic, agricultural, stockwatering and small commercial consumption by the members of those Bands who choose to earn their livings on reservation lands.

[11] The Secretary and the Bands subsequently challenged the adequacy of these conditions, but the court of appeals did not address that issue and it is not before this Court.

ficial public uses within the affected area" (*id.* at 150-151).

Pursuant to Section 4(e) of the Act, the Secretary of the Interior prescribed conditions to be contained in the license which he deemed "necessary for the adequate protection and utilization" of the affected reservations. The Commission accepted some of the Secretary's Section 4(e) conditions, but rejected or modified others on the ground that they would prevent the Commission from exercising its Section 10(a) judgment to ensure that the project would be the one best adapted to a comprehensive plan for beneficial public uses (Pet. App. 143-155).[12]

In addition, the Commission concluded that the licensees were not required, under Section 8 of MIRA (26 Stat. 714), to enter into contracts for canal rights-of-way with those Bands whose reservation lands are traversed by the Escondido Canal (Pet. App. 155-158). The Commission expressed the view that, "in light of the comprehensive regulatory scheme of the Federal Power Act, * * * Section 8 [of MIRA] is not applicable to appliances for the conveyance of water associated with water power projects" (*id.* at 157). On rehearing, the Commission held that, to the extent that Section 8 of MIRA may be inconsistent with provisions of the FPA, the former statute is repealed by Section 29 of the FPA, 16 U.S.C. 823 (Pet. App. 337-338).[13]

Finally, the Commission noted that the outcome of the water rights litigation pending in district court may have a significant impact on the continued validity of the license (Pet. App. 187 n.192).[14] It therefore speci-

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[12] The Commission rejected the Secretary's Section 4(e) conditions with respect to the Pala, Pauma and Yuima Reservations because the project works are not located within those reservations (Pet. App. 146-147).

[13] Section 29 provides that "[a]ll Acts or parts of Acts inconsistent with this chapter are repealed * * *." 16 U.S.C. 823.

[14] Section 9(b) of the FPA, 16 U.S.C. 802(b), requires applicants for water power licenses to submit satisfactory evidence to the

fied that the license may be modified "in any manner considered appropriate" after disposition of the water rights litigation (*id.* at 259).

C. The Decision of the Court of Appeals

1. The court of appeals reversed the Commission's order issuing a license to petitioners and remanded the case to the Commission for further proceedings (Pet. App. 1-29). The court first upheld the Commission's assertion of jurisdiction over the project (*id.* at 12-16). The court concluded, however, that, under Section 8 of MIRA, petitioners are required to obtain from the La Jolla, Rincon and San Pasqual Bands right-of-way permits, which are subject to the approval of the Secretary of the Interior, before they may utilize the portions of the Escondido Canal that traverse those reservations. The court rejected the Commission's argument that Section 29 of the FPA, 16 U.S.C. 823, repealed Section 8 of MIRA. The court saw no conflict between the Power Act and Section 8 of MIRA, which was enacted to enable the Indians to benefit from the construction of irrigation canals across reservation lands (Pet. App. 20-22). In the court's view, the two statutes are easily accommodated: "Where a project requiring a license * * * crosses lands to which MIRA applies, the operator of that project is required both to obtain a license from the Commission, and to obtain the necessary right-of-way by the method provided in Section 8 of MIRA" (Pet. App. 21).

In addition, the court of appeals held that the Commission lacked authority to reject or modify the conditions propounded by the Secretary of the Interior for inclusion in the license pursuant to Section 4(e) of the FPA (Pet. App. 22-25). The court rejected the argument that its interpretation of Section 4(e) conflicts with the Commission's obligation under Section 10(a) of the FPA, 16 U.S.C. 803(a), to approve a project that will be the one "best adapted to a comprehensive plan"

Commission that they possess the necessary water rights to operate the project as authorized in a license.

for the utilization of waterways and the development of power. The court concluded that Sections 4(e) and 10(a) are not inconsistent, reasoning (Pet. App. 24):

> In the case of a project within a reservation, once the Secretary of the Interior has propounded those conditions deemed necessary for the protection and utilization of the reservation, the Commission is free to modify the proposal in other ways, but not by altering or omitting Interior's conditions, to make it feasible and beneficial to the public. If this cannot be done, the Commission may decline to issue a license at all.

The court also rejected the claim that its construction of Section 4(e) would give the Secretary of the Interior an "unconditional veto power" over licensing authority, noting that any license issued by the Commission that includes conditions propounded by the Secretary would be subject to judicial review pursuant to Section 313(b) of the FPA, 16 U.S.C. 825*l*(b) (Pet. App. 24-25, as amended at Pet. App. 32-33).

Finally, the court held that the three reservations located downstream from the project also are entitled to the protection of the Section 4(e) reservation proviso. The court noted that the definition of "reservations" in the FPA includes "interests in lands" owned by the United States and reserved from private appropriation under public land laws (16 U.S.C. 796(2)), and it concluded that the water rights of the Pala, Pauma and Yuima Bands come within this definition (Pet. App. 25-26). Although it acknowledged that the use of the phrase "licenses * * * *within* any reservation" suggests that a project must be physically situated on a reservation before the provisions of Section 4(e) come into play, the court stated that it would resolve that ambiguity in favor of the applicability of the 4(e) proviso to the downstream reservations. The court reasoned (Pet. App. 27-28):

> A water project may occupy a geographical portion of an Indian reservation without impinging in

any serious way on Indian interests—e.g., by crossing a corner of the reservation with a power line or an access lane. Conversely, a project may turn a potentially useful reservation into a barren waste without ever crossing it in the geographical sense—e.g., by diverting the waters which would otherwise flow through or percolate under it. We will not attribute to Congress, on account of the mere presence in its enactment of one ambiguous word, the perverse and illogical intention of guarding carefully against the former danger while openly embracing the latter.

2. On petitions for rehearing, Judge Anderson dissented from portions of the panel's original opinion (Pet. App. 33-41). Noting that the FPA itself contains a scheme for acquiring the use of tribal lands within reservations, Judge Anderson concluded that Section 8 of MIRA cannot be considered as establishing a prerequisite for obtaining rights-of-way for FPA-licensed projects that convey water across Mission Indian reservation lands (Pet. App. 34-37). Furthermore, Judge Anderson concluded that, although the Secretary of the Interior's Section 4(e) conditions must be included in a license to the extent they are reasonable, the initial responsibility for reviewing those conditions for reasonableness should rest with the Commission, rather than with the reviewing court (Pet. App. 40-41).

SUMMARY OF ARGUMENT

I

Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), authorizes the Federal Energy Regulatory Commission to issue licenses for hydroelectric projects on any body of water over which Congress has jurisdiction under its commerce power, "or upon any part of the public lands or reservations of the United States." The statute specifically requires, however, that, before issuing a license for a project on a reservation, the Commission must find that the license "will not interfere or be

inconsistent" with the reservation's purpose. And, most relevantly, Section 4(e) also provides that any such license *"shall be subject to and contain such conditions"* as the Secretary with supervisory authority over the reservation *"shall deem necessary for the adequate protection and utilization of the reservations."*

Both the language and history of the FPA make Congress's intent crystal clear: when an applicant seeks a license for a project on a reservation (*e.g.*, a military reservation, a national forest, or an Indian reservation), the conditions prescribed by the appropriate Secretary for the protection and utilization of the reservation *must* be included in the license. The Commission, to put it simply, has no authority either to reject or to modify the Secretary's conditions. Thus, although Congress has permitted reservations to be used for water power development, it has sought to ensure that such reservations are adequately protected from the adverse effects of such development and that the uses for which the reservations were created are not impaired.

Petitioners and the Commission argue that this approach would undermine the principal goal of the FPA, which was to centralize licensing decisions in a single Commission. But Congress deliberately constructed the licensing provisions of the FPA in such a way as to preserve the responsibility of the individual Secretaries for the welfare of those reservations within their respective jurisdictions. This seems to us a perfectly rational scheme of allocating authority in the case of a project on a reservation. In any event, Congress has spoken clearly on the matter and the wisdom of the statutory scheme is not before the Court. Despite the dire protestations of petitioners and the Commission, the statute does not permit the Secretary to insert unreasonable conditions in the license and thus thwart the project. The Secretary's conditions are subject to review for reasonableness in the court of appeals, together with all other elements of the license.

II

The Commission's obligations under Section 4(e) to make a finding of no interference or inconsistency with the reservation's purpose before issuing a license, and to include in the license the appropriate Secretary's conditions for the protection and utilization of the reservation, extend to the Pauma, Pala and Yuima Reservations, which are located directly downstream from petitioners' proposed project, and whose reserved water rights will be affected by the project. The FPA defines "reservations" as including "interests in lands" that are owned by the United States or that are "acquired and held for any public purposes." As the court of appeals held (Pet. App. 25-26), the reserved water rights of the downstream reservations clearly are encompassed within this definition. Although the language of Section 4(e), which refers to "licenses issued * * * within any reservation," tends "to paint a geographical picture" (Pet. App. 26), it is more sensible to conclude that the Section 4(e) provision applies to any reservations that are sufficiently "affected" by a project to warrant invocation of the Commission's licensing authority under Section 23(b) of the FPA, 16 U.S.C. 817.

The argument that the downstream reservations are not protected by the Section 4(e) proviso because the Commission is not empowered "to adjudicate" water rights misses the point entirely. Adjudication of water rights is a far different matter from formulating conditions for the protection and utilization of a reservation. Indeed, the Commission itself recognized as much when, in including its own conditions in the license, pursuant to Section 10(a) of the FPA, 16 U.S.C. 803(a), it stated that its conditions were the "price in water of the power license" (Pet. App. 176). That the Commission is empowered to include conditions under the public interest standard of Section 10(a), however, does not render the Section 4(e) reservation proviso superfluous. Section 10(a) permits a balancing of various conflicting inter-

ests, whereas Section 4(e) requires a focused inquiry specifically designed to protect reservations.

III

Section 8 of MIRA authorizes rights-of-way across Mission Indian reservations for water conveyance facilities. Unlike other contemporaneously enacted right-of-way statutes, however, Section 8 of MIRA expressly requires tribal consent for such a grant. Against a background of widespread abuses of Mission Indians by white settlers, and, in particular, infringement on Indian water rights, Section 8 was enacted for the articulated purpose of securing for the Bands a "sufficient quantity of water for irrigating and domestic purposes" (26 Stat. 714).

Section 8 of MIRA, which is a specific statute addressing rights-of-way for water conveyance facilities, is applicable to petitioners' project, whose primary purpose is to convey water (and which only incidentally produces a small amount of power). The FPA, a general statute concerned with water power development, is not inconsistent with, and does not repeal, Section 8 of MIRA, either expressly or by implication. Nothing in the FPA or its history precludes a requirement of tribal consent where, as here, Congress previously legislated such a requirement.

ARGUMENT

I. WHEN A PROPOSED POWER PROJECT INCLUDES A RESERVATION, SECTION 4(e) OF THE FEDERAL POWER ACT REQUIRES THE FEDERAL ENERGY REGULATORY COMMISSION TO ACCEPT WITHOUT MODIFICATION CONDITIONS PRESCRIBED BY THE SECRETARY WITH SUPERVISORY AUTHORITY OVER THAT RESERVATION FOR THE ADEQUATE PROTECTION AND UTILIZATION OF THE RESERVATION

A. Introduction

1. In 1920, after more than six years of intense debate, Congress enacted the Federal Water Power Act

(FWPA), ch. 285, 41 Stat. 1063 *et seq.* (now codified as Part I of the FPA, 16 U.S.C. 791a *et seq.*). This was the culmination of congressional efforts to develop a comprehensive national policy for the hydroelectric development of our Nation's waterways. Prior to passage of the FWPA, control of hydroelectric development on federal lands and federally controlled waters was divided among three agencies: the Department of War, which had jurisdiction over navigable waterways and military reservations;[15] the Department of the Interior, which had jurisdiction over public lands, national parks and monuments, and Indian reservations;[16] and the De-

[15] The Secretary of War's authority stemmed principally from the Rivers and Harbors Appropriation Act of 1899, Ch. 425, 30 Stat. 1151, which required the consent of Congress, the Secretary of War (now Army), and the Chief of Engineers prior to the construction of any dam, bridge, or similar facility in the navigable waters of the United States, and which prohibited the obstruction of the navigable capacity of any waters of the United States even if such obstruction occurred on nonnavigable tributaries. See Sections 9 and 10, codified at 33 U.S.C. 401 and 403. In 1906 and 1910, Congress enacted the General Dam Acts, which specified conditions under which Congress would grant its permission for the construction of dams in navigable waters. Act of June 21, 1906, ch. 3508, 34 Stat. 386; Act of June 23, 1910, ch. 360, 36 Stat. 593. Both of these Acts required the Secretary of War and the Chief of Engineers to approve plans and specifications for all dams and accessory works.

[16] The Act of Mar. 3, 1891, ch. 561, § 18, 26 Stat. 1101, as amended, 43 U.S.C. 946, authorized the Secretary of the Interior to grant rights-of-way through the public domain for ditches, canals and reservoirs for purposes of irrigation. Development of electricity under this act was a subsidiary purpose. In 1896, Congress expressly authorized the Secretary to grant rights-of-way upon public lands and forest reserves "for the purpose of generating, manufacturing, or distributing electric power." (Act of May 14, 1896, ch. 179, 29 Stat. 120, as amended, 43 U.S.C. 957). See also Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, as amended, 43 U.S.C. 959; Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253, as amended, 43 U.S.C. 961. These Acts were repealed in 1976 insofar as they were applicable to the issuance of rights-of-way through public lands and lands within the National Forest System. Act of Oct. 26, 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2793.

partment of Agriculture, which had jurisdiction over national forests.[17] See generally, *Chemehuevi Tribe of Indians* v. *FPC*, 489 F.2d 1207, 1215-1223 (D.C. Cir. 1973), rev'd on other grounds, 420 U.S. 395 (1975); J. Kerwin, *Federal Water-Power Legislation* 105-114 (1926); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945).

Between 1914 and 1917, Congress considered various bills that dealt separately with hydroelectric development on navigable waters and public lands.[18] In 1917, President Wilson directed the Secretaries of War, Interior, and Agriculture to draft a bill establishing a comprehensive scheme for regulating water power development on all federal lands and waters. Kerwin, *supra*, at 217-218. Extensive hearings were held on this bill in 1918,[19] but it was not enacted into law until the following session of Congress. *Id.* at 255-262. As initially enacted, the statute provided for a Commission composed of the three Secretaries. As explained below (see pages 29-31, *infra*), the Act was amended in 1930 to create a Commission composed of five independent members.

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[17] In 1905, Congress transferred responsibility for the national forests from Interior to the Forest Service of the Department of Agriculture. Act of Feb. 1, 1905, ch. 288, § 1, 33 Stat. 628, codified at 16 U.S.C. 472. Thereafter, the Secretary of Agriculture issued permits for rights-of-way across national forests pursuant to the statutes listed in note 16, *supra*.

[18] See, *e.g.*, H.R. 16053, 63d Cong., 2d Sess. (1914) (Adamson Bill) (navigable waters); H.R. 16673, 63d Cong., 2d Sess. (1914) (Ferris Bill) (public lands); H.R. 408, 64th Cong., 1st Sess. (1915) (Ferris Bill) (public lands); S. 3331, 64th Cong., 1st Sess. (1915) (Shields Bill) (navigable waters). See also *Water Power Bill: Hearing on H.R. 16673 Before the Senate Comm. On Public Lands*, 63d Cong., 3d Sess. (1915) [hereinafter cited as *1914-1915 Hearings*]. *Chemehuevi Tribe of Indians* v. *FPC*, 489 F.2d at 1220 n. 61; Kerwin, *supra*, at 172-216.

[19] *Water Power: Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess. (1918) [hereinafter cited as *1918 Hearings*].

2. The basic licensing authority of the Federal Power Act is contained in Section 4(e), 16 U.S.C. 797(e). That section authorizes the Commission to issue licenses "for the purpose of constructing, operating, and maintaining" dams, water conduits, reservoirs, or other project works[20] "necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power" across or in any bodies of water over which Congress has jurisdiction under the Commerce Clause, "or upon any part of the public lands and reservations of the United States (including the Territories)." Section 10 sets forth certain general conditions upon which licenses are issued. Among other things, it requires that "the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan" for developing waterways for commerce, water power development, and other beneficial uses. 16 U.S.C. 803(a). Accordingly, the Commission may require the modification of any project and the plans and specifications of the project works before approval. It may also impose such "other conditions [as are] not inconsistent with the provisions of this chapter." 16 U.S.C. 803(g).

Congress, however, has not left every aspect of the licensing decision to the Commission's discretion. On the contrary, it has expressly limited the Commission's discretion where reservations[21] and navigable waterways are involved. Thus, the second proviso of Section 4(e) states that no "license affecting the navigable ca-

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[20] "Project works" are defined as all physical structures of a project, including power houses, water conduits, dams and appurtenant works and structures. 16 U.S.C. 796(11) and (12).

[21] The FPA defines "reservations" to include "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes." 16 U.S.C. 796(2).

pacity of any navigable waters of the United States shall be issued" until the plans of any structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army.[22] Section 18 of the FPA states that the Commission "shall require" a licensee to construct, maintain, and operate such "fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." 16 U.S.C. 811. That section further provides that the operation of any navigation facilities constructed in connection with a dam or diversion structure "shall at all times be controlled by" such navigation regulations "as may be made from time to time by the Secretary of the Army." Finally, the Commission must require the licensee to construct and maintain at its own expense such lights and signals "as may be directed by" the Coast Guard.[23]

Like restrictions on the Commission's discretion are applicable in the case of licenses affecting federal reservations. Under the first proviso to Section 4(e), no such license may issue unless the Commission finds that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." And, most importantly for present purposes, Section 4(e) also provides that the license issued "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations."

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[22] Similarly, Section 11(a) of the FPA, 16 U.S.C. 804(a), provides that the Commission may require a licensee to construct improvements for navigation purposes "in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of the Army."

[23] More recently, Congress has required the Commission, in granting exemptions to the FPA's licensing requirements, to include in its exemptions conditions prescribed by the Fish and Wildlife Service and by the comparable state agency to prevent loss of, and damage to, fish and wildlife resources. 16 U.S.C. 823a(c). See also 16 U.S.C. 2705(d).

B. The Language of Section 4(e) Expresses Congress's Intent that Licenses for Projects on Reservations Must Include, Without Modification, the Conditions Prescribed by the Appropriate Secretary

Petitioners (Br. 33-34) and the Commission (Br. 17-21) go to great lengths to direct the Court's attention away from the specific language of the Section 4(e) proviso at issue here.[24] As this Court has frequently observed, however, the starting point in construing a statute must be the statutory language, because it is logical to assume that Congress expresses its purposes through the ordinary meaning of the words it uses. See, *e.g.*, *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 4. Thus, "'[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive.'" *North Dakota* v. *United States*, No. 81-773 (Mar. 7, 1983), slip op. 12 (quoting *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Furthermore, the

> individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.

TVA v. *Hill*, 437 U.S. 153, 194 (1978).

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[24] Petitioners go so far as to contend (Br. 42-44) that Section 4(e)'s reservation proviso does not even apply here because this is a relicensing proceeding pursuant to Section 15(a) of the FPA, 16 U.S.C. 808(a). This argument must be rejected out of hand, since petitioners failed to preserve this objection. The Commission applied Section 4(e) after finding that the project for which petitioners sought a license was materially different from that originally licensed (Pet. App. 133-137). Because petitioners did not object to this finding in their petitions for rehearing to the Commission (COR 25,834-25,926), consideration of that issue is foreclosed. 16 U.S.C. 825*l*(b) (COR refers to the certificate of record in the court of appeals.) See *Greene County Planning Board* v. *FPC*, 528 F.2d 38, 45-46 (2d Cir. 1975).

The language of the first proviso in Section 4(e) could not be clearer. That statute expressly states that when a license includes a reservation, the license "*shall be subject to and contain such conditions* as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." 16 U.S.C. 797(e) (emphasis added).

Several points are obvious from a plain reading of the text. To begin with, the statute requires that the license "shall be subject to and contain" the Secretary's conditions. This language leaves no room for the Commission to reject or modify those conditions.[25] Moreover, the statute charges the Secretary under whose supervision the reservation falls with the responsibility for developing those conditions.[26] This is in contrast to the first clause of the reservation proviso, which charges the *Commission* with making a finding that the license will not interfere or be inconsistent with the purposes for which the reservation was created.

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[25] Congress easily could have expressed a contrary intention by providing that the Secretary may "recommend" conditions for inclusion in the license. See Section 14(b) of the FPA, 16 U.S.C. 807(b), which provides that any agency may recommend that the United States exercise its right to take over any project.

[26] The Secretary of the Interior does not claim authority to impose Section 4(e) conditions on every Commission project. His Section 4(e) authority is activated only in the case of reservations under his supervision. In the instant proceeding, the reservations involved are all Indian reservations under the supervision of Interior. But the term "reservations" also includes, inter alia, national forests under the supervision of the Department of Agriculture and military reservations under the supervision of the Department of Defense. 16 U.S.C. 796(2). Thus, when national forests or military reservations are included within licenses, the Secretaries of those departments have authority to develop conditions for the protection and utilization of those reservations. As discussed below (page 38, supra), the Secretaries' Section 4(e) authority is limited to developing conditions that are reasonably necessary for the adequate protection and utilization of the reservations.

In sum, although the authority to issue a license rests with the Commission, Congress empowered other federal officials to protect other federal interests, such as navigation, fishways, and reservations. See pages 19-20, *supra*. The Commission argues (Br. 19-20 & n.25), however, that if it is required, under Section 4(e), to accept the Secretary's conditions without modification, its authority to adopt the project best adapted to a comprehensive plan for beneficial uses, pursuant to Section 10 (a) of the FPA, 16 U.S.C. 803(a), would thereby be impaired.[27] But this argument, if accepted, would require the Court to construe the specific mandate of Section 4(e) in such a way as to deprive it of meaning.

Congress has determined that power projects may be located on reservations, but only if issuance of the license would not interfere with the reservation's purposes and only if the appropriate Secretary's conditions are inserted in the license to insure adequate protection and utilization of the reservation. There can be no doubt that the reservation proviso in Section 4(e) makes protection and utilization of reservations paramount to power development.[28] Significantly, Congress placed the responsibility for prescribing the Section 4(e) conditions squarely upon the Secretary with responsibility over the affected reservation. Thus, while the Commission is guided by its authority under Section 10(a) to promote power development, it is the individual Secretary's responsibility under Section 4(e) to see that reservations under his supervision are adequately protected from the

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[27] Petitioners also cite (Br. 34 n. 45) Section 10(i) of the FPA, 16 U.S.C. 803(i), which permits the Commission to waive certain conditions and requirements in issuing licenses for minor projects. Although Project No. 176 qualifies as a minor project in view of the minimal amount of power it produces, the Commission expressly refused to waive the Section 4(e) requirements in this case (Pet. App. 137).

[28] This proviso parallels the second proviso of Section 4(e), which likewise makes protection of the navigable waterways paramount to power development. See, pages 19-20, *supra*.

adverse effects of that power development and that the uses for which the reservations were created are not impaired. Although the Commission makes a "public interest" determination under Section 10(a) (*Udall* v. *FPC*, 387 U.S. 428, 450 (1967)), that decision must be made in light of the secretarial conditions. If the conditions necessary to protect the reservation from the adverse effects of the power development make the project infeasible, the Commission "may decline to issue a license" (Pet. App. 24).

It is no answer to invoke—as both petitioners (Br. 33) and the Commission (Br. 13, 21) do—generalized statements in earlier cases to the effect that the FPA constitutes a "complete and comprehensive plan" for the development of hydroelectric power (*FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960)), and was intended to replace the "piecemeal" approach to hydroelectric development that existed under earlier laws (*First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 180 (1946)). These statements obviously do not address or resolve the question presented here concerning the extent to which the FPA itself allocates responsibilities to federal agencies other than the Commission.[29]

C. The Legislative History of the FPA Confirms that the Secretary's Section 4(e) Conditions are Mandatory

One overriding congressional concern is clear from the FPA and its legislative history: military reservations,

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[29] The Court's statement in *Tuscarora* was made in the context of determining whether reservation lands owned in fee by an Indian tribe, which the Court concluded did not constitute a "reservation" as that term is defined in the FPA, were subject to condemnation under Section 21 of the FPA, 16 U.S.C. 814. In *First Iowa*, the Court concluded that Section 9(b) of the FPA, which requires a license applicant to submit satisfactory evidence that it has complied with state laws respecting water appropriation, use of streambed, and the right to engage in the power business, does not require the applicant to comply with other state laws that conflict with the authority delegated to the Commission in the FPA.

Indian reservations, and national forests, which have been reserved from public disposal for specified uses, are not to be impaired by hydroelectric development. Even the earliest bills under consideration, which would have authorized the Secretary of the Interior to lease "reserved or unreserved" public lands, typically provided that

> such leases shall be given within or through any of said national forests or other reservations only upon a finding by the chief officer of the department under whose supervision such forest, national monument, or reservation falls that the lease will not injure, destroy, or be inconsistent with the purpose for which such forest, national monument, or reservation was created or acquired.

H.R. 16673, 63d Cong., 2d Sess. § 1 (1914), *reprinted in 1914-1915 Hearings* 5-6. As Edward Finney, the Assistant Attorney of the Department of the Interior, testified, the intent of this clause was to permit the chief officer with supervisory authority over the reservation "to refuse to sanction [the license] upon the grounds that it might interfere with the purposes of the reservation." *1914-1915 Hearings* 79.

This concept was retained in subsequent proposals, including the bill prepared in 1917 by the Secretaries of War, Interior and Agriculture at the request of President Wilson (see page 18, *supra*). The relevant provision of the Administration bill (H.R. 8716, 65th Cong., 2d Sess. § 4(d) (1918)) was ultimately enacted without substantive change as part of the FPA. In a memorandum explaining the bill, O.C. Merrill, one of the chief draftsmen of the FWPA in the Department of Agriculture and later the first Commission Secretary, wrote that creation of the Commission "will not interfere with the special responsibilities which the several Departments have over the National Forests, public lands and navigable rivers" (J.A. 371). With regard to what is now Section 4(e), he explained (J.A. 373-374 (emphasis added)):

4. Licenses for power sites within the National Forests to be subject to such provisions for the protection of the Forests as the Secretary of Agriculture may deem necessary. Similarly, for parks and other reservations under the control of the Departments of the Interior and of War. Plans of structures to be subject to the approval of the Secretary of War.

This provision is for the purpose of preserving the administrative responsibility of each of three Departments over lands and other matters within their exclusive jurisdiction.

This position was reaffirmed during hearings on the Administration's water power bill, when Secretary of Agriculture Houston was asked about the possibility of exempting the Grand Canyon from the operation of the bill. He responded (*1918 Hearings* 683 (emphasis added)):

> I can see no special reason why the matter might not be handled safely under the provisions of the proposed measure, which requires that developments on Government reservations may not proceed except with the approval of the three heads of departments—the commission—*with such safeguards as the head of the department immediately charged with the reservation may deem wise.*

Later, Secretary Houston left no doubt that a Secretary's Section 4(e) conditions could not be overridden by the Commission as a whole:

> If I am not mistaken, the provisions in the proposed measure are more restrictive than existing law, in that they require the assent of three heads of departments and *also the assent of the particular head of the department immediately charged with that Government interest.*

1918 Hearings 684 (emphasis added).

The intended import of Section 4(e) was again demonstrated during the Senate debates on the Administration's bill. In explaining the effect of Section 4(e), Senator

Walsh of Montana, a strong supporter of the Administration's bill, stressed that a license for a project on an Indian reservation could not issue without the consent of the Secretary of Interior:

> That is to say, when an application is made for a license to construct a dam within an Indian reservation, the matter goes before the commission, which consists of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. They all agree that it is in the public interest that the license should be granted, or a majority of them so agree. *Furthermore, the head of the department must agree; that is to say, the Secretary of the Interior in the case of an Indian reservation must agree that the license shall be issued.*

59 Cong. Rec. 1564 (1920) (emphasis added).[30]

In contrast, the Commission and petitioners are unable to point to any legislative history leading to the passage of the 1920 FWPA that contradicts the statute's plain meaning that a Secretary's Section 4(e) conditions are binding on the Commission.[31] The references in the hearings and committee reports cited by the Commission (Br. 23) address the need to develop and implement a national water power policy through a single commission, rather

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[30] Although petitioners recognize that the thrust of Senator Walsh's remarks were that "Interior could 'veto' the use of reservation land" (Pet. Br. 35 n.46), they attempt to place Senator Walsh's statement "in perspective" by pointing to comments subsequently made by Senator Myers. But those comments refer only to the circumstances under which Senator Myers thought the Secretary would vote to issue a license using reservation lands. Unlike Senator Walsh, Senator Myers did not address the question whether Section 4(e) required Interior's consent to a project involving an Indian reservation, although the logical implication of Senator Myers' statement that the Secretary would "resist" any application that was not "fair and right and reasonable" to the Indians (59 Cong. Rec. 1566 (1920)) is that he too believed Interior's consent was required.

[31] Indeed, amici American Public Power Association, *et al.*, concede (Br. 11 n.19) that this legislative history provides support for our interpretation.

than through three separate departments with jurisdiction over a particular project dependent upon whether it was to include navigable waters, public lands, or national forests. We do not dispute that this is what Congress intended in creating the Commission. But Congress also expressly afforded special protections to reservations in Section 4(e). The general references cited by the Commission do not address the effect of that proviso.[32] On the other hand, the statements from the legislative history on which we rely were directed specifically at the effect of Section 4(e), and thus are far more persuasive than the remarks quoted by the Commission and petitioners. Moreover, the statements of agency representatives such as O.C. Merrill and Secretary Houston, who " 'participated in drafting and directly made known their views to Congress in committee hearings,' " are necessarily entitled to " 'great weight.' " *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982) (quoting *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969)).[33]

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[32] Likewise, the statements in the debates cited by the Commission (Br. 23-25 & n.29) were made during discussion of Section 2 of the proposed bill, not Section 4(e). The discussion concerned how the Commission was to undertake its work, *i.e.*, whether the Commission could draw upon the staffs of all three departments, or whether each Secretary individually would "run with an iron hand" the lands under his own jurisdiction. 56 Cong. Rec. 9667 (1918) (Rep. Ferris).

By the same token, the portions of Secretary Houston's testimony on which petitioners rely (Br. 34-35) focused not on the Section 4(e) proviso, but on other matters, such as the desirability of reposing authority in a commission composed of three Secretaries rather than in a single executive (*1918 Hearings* 676-677), and the scope and implementation of Section 10(a) of the Act (*1918 Hearings* 678).

[33] The 1921 House report cited by the Commission (Br. 25) does not address the Secretary of the Interior's authority under Section 4(e). The Secretary objected to the inclusion of national parks and monuments within the FWPA because he believed that Congress should determine on a case-by-case basis whether any hydroelectric development should occur in national parks or monuments. H.R. Rep. 1299, 66th Cong., 3d Sess. 2 (1921).

The reliance by the Commission and petitioners upon the legislative history of the 1930 amendments to the FWPA is equally unpersuasive. Significantly, the 1930 legislation amended only Sections 1 and 2 of the FWPA. Act of June 23, 1930, ch. 572, 46 Stat. 797. The amendments reorganized the Commission by replacing the three Secretaries with five independent Commissioners appointed by the President. Congress also for the first time authorized the Commission to hire its own headquarters staff instead of requiring it to rely upon personnel detailed from the Departments of War, Interior, and Agriculture,[34] although the amendments did continue in force the pre-existing arrangement under which engineers from those three Departments were detailed for work in the Commission's field offices. The 1930 amendments, however, left unchanged the Section 4(e) proviso empowering individual Secretaries to impose conditions on licenses to insure the adequate protection and utilization of reservations under their supervision.

The purpose of the 1930 amendments was spelled out in the President's message to Congress accompanying the proposed legislation. Because the work of the Commission had greatly expanded since 1920, the Secretaries were unable to devote sufficient time to fulfill their responsibilities under the FWPA. Thus, the President recommended, and Congress provided for, full-time Commissioners to replace them. See *Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce*, 71st Cong., 2d Sess. 18 (1930) [hereinafter cited as *1930 House Hearings*]; S. Rep. 378, 71st Cong., 2d Sess. 2-3 (1930); H.R. Rep. 1793, 71st Cong., 2d Sess. 2-3 (1930).

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[34] The 1920 FWPA had authorized the Commission to hire only an executive secretary. Act of June 10, 1920, ch. 285, § 2, 41 Stat. 1063. The 1930 amendments gave the Commission additional authority to hire a chief engineer, a general counsel, a solicitor, a chief accountant, and such other "officers and employees as are necessary" to carry out its functions. § 2, 46 Stat. 798.

The legislative history makes clear that the 1930 amendments were not intended to alter in any way the respective powers of the Commission and the Secretaries. Thus, the Senate Report stated that the purpose of the legislation was "to reorganize the Federal Power Commission *without adding to the existing authority of the commission.*" S. Rep. 378, *supra*, at 2. Similarly, the remarks during the floor debates confirm that the 1930 amendments did not enlarge the powers of the Commission. See, *e.g.*, 72 Cong. Rec. 8752 (1930) (colloquoy between Sen. Robinson and Sen. Couzens); *id.* at 10332 (Rep. Clark). For example, in response to a question concerning whether the bill would interfere with the requirement, in the second proviso of Section 4(e), that plans for a dam affecting navigation must be approved by the Chief of Engineers and the Secretary of War, Representative Parker, Chairman of the House Committee and chief proponent of the bill, stated (72 Cong. Rec. 10332 (1930)): "There is no intention to take away from the War Department and from the Army engineers the power to decide whether a dam will be detrimental to navigation or not." Similarly, Representative O'Connor inserted into the record a memorandum from the Chief of Engineers of the War Department, who opposed the bill's enactment. The memorandum stated that, by repealing Section 2 of the FWPA, the bill

> takes from the Secretary of War and the Chief of Engineers all authority and responsibility in connection with the investigation of water-power developments in navigable waters or on tributaries thereto, and *confines their functions to the veto power contained in section 4(d)* [now Section 4(e)] of the act.

72 Cong. Rec. 10336, 10337 (1930) (emphasis added). In short, there is no indication that Congress in 1930 meant to reduce the authority of the Secretaries under Section 4(e) to prescribe conditions for inclusion in licenses with respect to projects on reservations within their respective jurisdictions.

The Commission (Br. 25-27, 42 n.43) and petitioners (Br. 35-37) rely upon isolated statements from the 1930 hearings that do not mention the Secretaries' Section 4(e) authority. The focus of the discussion during the hearings was on how the staff work of the new commission would be carried out. Although the Chief Engineers of both the Forest Service and the War Department argued that the engineering work of the Commission should continue to be performed in the field by employees of the individual departments (*1930 House Hearings* 14-15, 22-24), Agriculture Secretary Hyde and Interior Secretary Wilbur believed that the Commission should have its own staff, not one under the control of the departments, and that the interests of the departments could be presented at hearings before the Commission (*id.* at 32-33 (Secretary Hyde), 48-49 (Secretary Wilbur)). Neither Secretary Wilbur nor Secretary Hyde specifically addressed the authority of the individual Secretaries under Section 4(e) to condition licenses for projects on reservations. In contrast, Representative Hoch, a member of the House Committee, stated that the bill "does not affect in any way the present law with reference to the granting of permits or licenses, [or] *the conditions under which they are granted*" (*1930 House Hearings* 28 (emphasis added)). See also *id.* at 46 (Rep. Parks). Thus, even if portions of Secretary Wilbur's and Secretary Hyde's remarks might be construed as suggesting that the Secretaries' Section 4(e) conditioning authority should be curtailed, there is no evidence that Congress in fact accepted that suggestion. See pages 29-30, *supra*.[35]

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[35] The Commission also relies (Br. 25-26) upon statements made by O.C. Merrill and James Lawson, then Acting Chief Counsel of the Commission. *Investigation of Federal Regulation of Power: Hearings on S. Res. 80 and S. 3619 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess., Pt. 2 (1930) [hereinafter cited as *1930 Senate Hearings*]. Merrill, who by that time had left the Commission (*1930 Senate Hearings* 211), advocated that the Commission's field work should be done by the three departments, but that the departments would have "no final responsibility" in

In short, the legislative history conclusively demonstrates that the language of Section 4(e) is no accident of legislative draftsmanship, but that Congress meant what it so clearly said: licenses on reservations "shall be subject to and contain" the conditions prescribed by the appropriate Secretary "for the adequate protection and utilization" of the reservations.

D. The Commission's Administrative Interpretation has not been Longstanding or Consistent and is not Entitled to Deference

Both the Commission (Br. 33) and petitioners (Br. 37-38) rely on the Commission's prior administrative practice and construction to support their interpretation. This construction, however, has itself been inconsistent and is controverted by longstanding interpretations advanced by other federal agencies. Accordingly, the Commission's interpretation is not entitled to deference. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140-146 (1976).

In 1929, the Commission's legal staff, in a formal memorandum to the Commission's executive secretary, con-

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these matters (*id.* at 280). He did not address what authority the departments would have under Section 4(e). Likewise, Lawson's statement that the Commission already had the power to override a departmental head as to "the consistency of a license with the purpose of any reservation" (*id.* at 358) has no bearing upon a Secretary's authority to condition a license for the adequate protection and utilization of reservation. Section 4(e) makes these two functions separate: the making of a "no interference or inconsistency" finding is the responsibility of the Commission; the promulgation of conditions for the adequate protection and utilization of the reservation is the responsibility of the individual Secretaries. Indeed, in a memorandum to the Commission's executive secretary written one year earlier, Lawson concluded that the Secretary of the Interior had authority under Section 4(d) of the FWPA (now Section 4(e)), apart from his authority as a Commission member, "to prescribe conditions to be inserted in the license for the protection and utilization of the reservation." Memorandum of Sept. 20, 1929, at 23; COR 24,421. See page 33, *infra*.

cluded that the Secretary of the Interior had authority under Section 4(d) of the FWPA (now Section 4(e)) to impose conditions on a license necessary for the adequate protection and utilization of an Indian reservation. Memorandum of Sept. 20, 1929, COR 24,399-24,427. At issue was an application by the Rocky Mountain Power Company for a license to build a power project on the Flathead Indian Reservation. In order to settle certain claims asserted by the United States, the Flathead Indians, and non-Indian settlers on the Flathead Irrigation Project to a power site on the Flathead River, the power company proposed to sell electric energy at reduced rates to the irrigation project. In discussing how the rights of the Indians could be protected in such a settlement, the Commission's legal opinion stated:

> In its ordinary jurisdiction over Indian tribal lands, the Federal Power Commission when issuing licenses, has authority to make a finding whether the project "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" and to "fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter." In no case can the provisions of the law be waived as to lands in Indian reservations (Sec. 10(i)). *The function of the Secretary of the Interior in such cases, apart from his membership on the Commission and his authority to designate personnel from his department to perform work for the commission, is, under Sec. 4(d)* [now Section 4(e)], *to prescribe conditions to be inserted in the license for the protection and utilization of the reservation.*

Memorandum at 23; COR 24,421 (emphasis added).

The Commission (Br. 33) and petitioners (Br. 37) principally rely upon *Pigeon River Lumber Co.*, 1 F.P.C. 206 (1935). That case, however, did not address the portion of the Section 4(e) proviso dealing with secretarial

conditions. The Commission held only that under the first clause of Section 4(e)'s reservation proviso, it is the obligation of the Commission, not the Secretary, to find that the license will not interfere or be inconsistent with the purpose for which the reservation was created. The Commission stated that, in making the no interference/inconsistency determination, it would give great weight to the judgment and recommendation of the Secretary of the Interior. 1 F.P.C. at 209. We agree that this is the plain import of the first clause of the reservation proviso, but we note that the Commission in *Pigeon River* did not address the second clause, dealing with secretarial conditions, which just as plainly vests paramount authority in the respective Secretaries.[36]

Neither petitioners nor the Commission cite a single instance in which a Secretary's Section 4(e) conditions were rejected by the Commission at any time prior to its 1975 decision in *Pacific Gas & Electric Co.*, 53 F.P.C. 523.[37] On the other hand, as early as 1935, the Secretary

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[36] The *Pigeon River* proceeding involved not the issuance of a license, but an application for a preliminary permit pursuant to Sections 4(f) and 5 of the FPA, 16 U.S.C. 797(f) and 798. Hence, the reservation proviso was not applicable, and no secretarial conditions had been submitted to the Commission. 1 F.P.C. at 209. The Office of Indian Affairs contended that any preliminary permit that might be issued "would be made untenable because of the conditions which the Secretary [of the Interior] would feel impelled to include in the license for the protection of the Indians" (*ibid.*). The Commission did not address this potential problem. Its remarks were confined to the portion of the proviso requiring a finding of non-interference and consistency with the reservation's purposes. Nothing was said about the relative powers of the Secretary and the Commission to impose license conditions. Because the preliminary permit was denied on other grounds (*id.* at 210-211), the Commission had no occasion in *Pigeon River* to discuss the issue presented in this case.

[37] The remaining Commission cases which they cite (FERC Br. 33; Pet. Br. 37 n.47) are all distinguishable. In *Pacific Gas & Electric Co.*, 6 F.P.C. 729 (1947), the Commission deferred for further study conflicting recommendations by the Secretary of Agriculture and the California Division of Fish and Game for the support of

of the Interior, through the Office of Indian Affairs, asserted that his Section 4(e) conditions were binding on the Commission. See *Pigeon River*, 1 F.P.C. at 209. Likewise, the Secretary of Agriculture made his views known to Congress in 1968 when it was considering amending Section 15 of the FPA, 16 U.S.C. 808, to authorize the Commission to license projects for nonpower use. The Secretary informed the House Committee that the Commission had agreed to consult with his Department regarding the issuance of any licenses for nonpower purposes that affected national forests. Moreover, the Secretary stated that the Commission had agreed that a license for such use

> will be issued only with the consent of this Department and subject to such conditions as we deem necessary for the adequate protection and utilization of the lands under our jurisdiction.

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fish life in certain national forests. The Commission's order does not state whether the Secretary's "recommendations" were proffered pursuant to his Section 4(e) conditioning authority or whether the Secretary agreed to further studies. In *Southern California Edison Co.*, 8 F.P.C. 364 (1949), the Commission requested the Secretary of Agriculture to reconsider a special condition requiring a specified water flow over a diversion dam to protect downstream recreation values in the Sequoia National Forest. The Secretary reconsidered the flow requirements in light of evidence submitted by the applicant and imposed a revised condition. *Id.* at 368. The Commission stated that Section 4(e) "authorizes" it to impose "such conditions in a license as the Secretary of Agriculture may deem necessary for the adequate protection and utilization of the national forest involved" (*id.* at 385). Because the Commission agreed with the Secretary's condition, that case did not present the issue involved here. In *Arizona Power Authority*, 39 F.P.C. 955 (1968), the applicant and the Indian tribe entered into an agreement permitting the applicant to use tribal water resources and establishing the amount of compensation therefor. Although the Secretary approved the agreements (*id.* at 958), the Commission did not require as a condition of the license that the applicant obtain the Secretary's approval, in addition to that required by the tribe, to readjustments of water use or compensation. Finally, *Montana Power Co.*, 56 F.P.C. 2008 (1976), involved the term of a license, not a Section 4(e) condition.

H.R. Rep. 1643, 90th Cong., 2d Sess. 14-15 (1968). See also *Pacific Gas & Electric Co.*, 53 F.P.C. at 526 (Secretary of Agriculture asserted that Section 4(e) conditions were binding).

The division of responsibility between the respective Secretaries and the Commission—and the mandatory nature of the secretarial conditions—was also recognized by the report of the Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and to the Congress* 154 (1970) (emphasis added):

> [T]he Federal Power Commission is given the ultimate authority to decide whether a project having an impact on a Federal reservation shall be licensed, presumably even over the holding agency's objection (the role fulfilled by Congress for Bureau and Corps' projects), *although the Commission must include such conditions in the license as the holding agency considers necessary.*

This conclusion is especially significant because representatives of the Federal Power Commission served as members of the Advisory Council to the Public Land Law Review Commission established pursuant to 43 U.S.C. (1970 ed.) 1396.[38]

As the foregoing discussion demonstrates, there is no consistent, longstanding administrative construction of Section 4(e) by the Commission to which to defer. The current interpretations of the affected administrative agencies are in conflict. In these circumstances, prior administrative practice and construction count for naught. See *General Electric Co.* v. *Gilbert*, 429 U.S. at 140-146.

E. Review of the Reasonableness of the Secretary's Section 4(e) Conditions Properly Rests With the Court of Appeals, not the Commission

The Secretary of the Interior has consistently adhered to the position that his authority under Section 4(e) to

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[38] See *One Third of the Nation's Land, supra*, at vi, vii. Other commentators have also concluded that a Secretary's Section 4(e) conditions are mandatory. See, *e.g.*, Lazarus, *Indian Rights Under The Federal Power Act*, 20 Fed. B.J. 217, 221 (1960).

condition licenses that affect reservations is subject to certain limitations. By its terms, Section 4(e) itself requires that any conditions prescribed by the Secretary for inclusion in a license must be "necessary for the adequate protection and utilization of such reservations." Furthermore, the Secretary's conditions cannot be imposed arbitrarily; they must be reasonable and supported by evidence in the record.

In view of the highly contested nature of the licensing proceeding in this case, the Secretary submitted his proposed conditions for comment early in the administrative proceeding and reserved the right to change or modify them based upon the record as it developed (J.A. 49, 61). During the evidentiary hearing, petitioners and the Commission staff commented upon the proposed conditions. Three high ranking officials from the Department of the Interior testified and, in response to questioning, they agreed to modify and re-examine certain conditions (J.A. 105-201). Subsequently, the Secretary submitted revised conditions accompanied by detailed explanations (J.A. 218-242).

Because the Commission concluded that it was not required to accept the Secretary's conditions as propounded (Pet. App. 143-155), it developed its own conditions for inclusion in the license (*id.* at 170-190, 219-221). On review, the court of appeals concluded only that the Secretary's conditions were binding on the Commission; it did not determine whether the Secretary's conditions were consistent with the statutory mandate, supported by evidence in the record, or reasonable. Hence, the substance of those conditions is not properly before this Court.[39]

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[39] We note, however, that neither the Commission in its order nor petitioners in the administrative proceeding challenged the Secretary's conditions on the grounds that they were arbitrary or capricious, or not necessary for the adequate protection and utilization of the reservations. The Commission did criticize the Secretary's conditions for not taking account of petitioners' proposed project (Pet. App. 143-155). But under Section 4(e), the Secretary's only concern is to ensure the adequate protection and utilization of the reservations.

All agree that the Secretary's conditions must be *reasonably* related to the adequate protection and utilization of the affected reservation. Both the Commission (Br. 39-43) and petitioners (Br. 38-39) argue, however, that the FPA's judicial review provision requires the Commission, rather than the court of appeals, to have the initial responsibility for reviewing the Secretary's conditions under the reasonableness standard. This argument is insubstantial.

Judicial review of Commission orders under the FPA is established by Section 313(b) of the FPA, 16 U.S.C. 825*l*(b), which was first enacted in 1935, 15 years after enactment of Section 4(e). Nothing in Section 313(b) amended Section 4(e), or made any pretense of changing the binding nature of the Secretary's Section 4(e) conditions.

The Commission notes (Br. 40) that its licensing orders are reviewable by the court of appeals to determine whether they have a reasonable basis in law and are supported by substantial evidence. By the same token, we submit, any secretarial conditions that are included in a license, and are thereby made part of the Commission's order, are subject to initial review by the court of appeals under these same standards. That the Commission's orders are reviewable under Section 313(b) only begs the question whether the Secretary's Section 4(e) conditions are binding on the Commission. The statute charges the Secretary, not the Commission, with prescribing conditions that the Secretary deems to be necessary. Moreover, because the Secretary's conditions must be "contain[ed]" in the license, the court of appeals must review those conditions, not the Commission's substitutes. In other words, the Secretary's conditions are entitled to a presumption of validity and must be affirmed if they are supported by substantial evidence and are within the scope of the authority delegated to the Secretary.[40]

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[40] On the other hand, if the Commission denies a license because, in its view, the Secretary's conditions render the proposed project

II. SECTION 4(e)'s RESERVATION PROVISO PROTECTS THE RESERVED WATER RIGHTS OF THE PAUMA, PALA AND YUIMA RESERVATIONS

Section 3(2) of the FPA, 16 U.S.C. 796(2) (emphasis added), defines the term "reservations" as used in the FPA to mean:

> national forests, *tribal lands embraced within Indian reservations*, military reservations, and other lands *and interests in lands owned by the United States*, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; *also lands and interests in lands acquired and held for any public purposes*; but shall not include national monuments or national parks.

The Act's definition of "reservations" does not limit the term to the physical soil itself. It expressly includes "interests in lands" that are owned by the United States or that are "acquired and held for any public purpose." Relying on this broad statutory language, the court of appeals unanimously held that Section 4(e)'s reservation proviso applies not only to those reservations that are physically occupied by the project works, but also to the Pauma, Pala and Yuima Reservations, which are situated in the San Luis Rey River watershed directly downstream from petitioners' diversion dam, and whose water rights are affected by the project (Pet. App. 25-28).[41]

Neither the Commission nor petitioners appear to challenge the court of appeals' ruling (Pet. App. 25-26) that the water rights of the downstream reservations are encompassed within the definition of "reservations" in the FPA.[42] Instead, relying on the portion of the Section

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impractical, we assume the disappointed applicant is free to challenge the Commission's order under Section 313(b) by attacking the secretarial conditions.

[41] Judge Anderson, who dissented from the court's other holdings, agreed that Section 4(e)'s reservation proviso applies to the downstream reservations (Pet. App. 33).

[42] *FPC* v. *Tuscarora Indian Nation*, 362 U.S. at 114-115, is not to the contrary. *Tuscarora* holds that tribal lands owned in fee by

4(e) proviso that refers to "licenses * * * issued within any reservation", they contend that application of the proviso is limited to reservations physically occupied by the facilities of a project. Although, as the court below noted (Pet. App. 26), "the word 'within' tends to paint a geographical picture," other provisions of the FPA provide evidence that the scope of Section 4(e) is not so limited. For instance, Section 23(b) of the Act, 16 U.S.C. 817, provides that a project on non-navigable waters over which Congress has jurisdiction under its Commerce Clause powers must be licensed by the Commission if any public lands or reservations "are affected" by the project. Section 23(b) thus represents a deliberate congressional choice to invoke the protective provisions of the FPA when a project "affects" a reservation but is not physically "upon any part of" the reservation. It would make no sense to conclude that Congress directed the Commission to exercise its jurisdiction in such instances if Congress did not also intend to afford the "affected" reservation the full benefit of Section 4(e)'s proviso.[43]

There can be no doubt that issuance of a license to petitioners would "affect" the downstream reservations by impairing the reserved water rights acquired by the Bands when their reservations were created. See *Arizona* v. *California*, 373 U.S. 546 (1963); *Cappaert* v. *United States*, 426 U.S. 128 (1976). The Pala Reservation is located directly on the San Luis Rey River (Pet. App. 308). Although the Pauma and Yuima Reservations are

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an Indian Tribe are not "reservations" within the meaning of the FPA because those lands are not "owned by the United States." In contrast, as the court of appeals explained (Pet. App. 25-26), the Bands' water rights and the reservations to which they attach are *property* interests that are owned by the United States.

[43] Furthermore, Section 10(e) of the FPA, 16 U.S.C. 803(e), authorizes the Commission to fix annual charges for "the use of * * * tribal lands embraced within Indian reservations." Congress's careful use in this section of only a portion of the definition of "reservations" demonstrates that it was quite capable of limiting the effect of a particular provision of the FPA to lands within the physical boundaries of a reservation when it intended such a result.

not located on the river itself, they overlie the Pauma and Pala Basins, which are groundwater reservoirs providing year-round sources of water (Pet. App. 122). The Commission expressly acknowledged that the project "diverts water into the Escondido Canal which would otherwise percolate into the Pauma and Pala Basins" (*id.* at 123 n.119). The continued diversion of this water, together with the importation of poorer quality water from outside the area, would result in the rapid deterioration of the Basins' groundwater quality (J.A. 208).

Petitioners (Br. 46) and the Commission (Br. 37-38) nevertheless argue that the downstream reservations are not subject to the protections of the Section 4(e) proviso because the Commission is not empowered "to adjudicate" water rights. But adjudication of water rights is a far different matter from formulating conditions for the protection and utilization of a reservation. The Commission itself developed conditions for water deliveries in response to the claims of the Secretary and the Bands that any water that petitioners are licensed to take through Indian lands that could otherwise be used by the Bands "'necessarily interferes with the utilization of the reservation by the Indians'" (Pet. App. 173).[44] The Commission found ample authority under Section 10(a) of the FPA "to require the modification of water rights incident to a project if such modification is necessary" to enable it to make the no interference/inconsistency determination required by the first clause of the Section 4(e) proviso (Pet. App. 174). Such conditions, the Commission concluded, were the "price in water of the power license issued herein" (*id.* at 176).[45]

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[44] Although, on rehearing, the Commission qualified its prior opinion with equivocal statements (Pet. App. 362-366), the conditions remained unchanged.

[45] Whatever water rights the licensee brings to the project are effectively submitted to the Commission's disposition upon acceptance of the license. See *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 419-428 (1946).

Amicus Edison Electric Institute contends (Br. 22-23) that the downstream reservations are sufficiently protected by Section 10(a) of the FPA and that there is no need to apply the protections of Section 4(e) to these reservations. See also Pet. Br. 46. Although Section 10(a) does require the Commission to assess the "public interest" (*Udall* v. *FPC*, 387 U.S. at 450), the availability of Section 10(a) does not render the Section 4(e) reservation proviso superfluous. Section 10(a)'s public interest standard requires a balancing of the many competing interests involved, whereas Section 4(e) embodies a specific congressional mandate designed to protect reservations. As the court of appeals observed (Pet. App. 27-28), it makes no sense to apply Section 4(e)'s protective provisions to a reservation that suffers a minimal physical intrusion, but not to a downstream reservation whose entire water supply may be diverted.

III. PETITIONERS MUST COMPLY WITH THE RIGHT-OF-WAY REQUIREMENTS OF SECTION 8 OF MIRA

At issue here are two intertwined notions: one involving aspects of tribal sovereignty; the other involving Congress's exercise of its power to determine if and how Indian lands may be utilized. This Court has previously recognized that one of the purposes for which Congress created Indian reservations was to set aside territory over which tribes may exercise sovereignty and have "the right * * * to make their own laws and be ruled by them." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980). Among the most significant aspects of the sovereignty of an Indian tribe is its inherent power, absent contrary treaty provisions or congressional enactments, to exclude non-members from the reservation. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *Quechan Tribe of Indians* v. *Rowe*, 531 F.2d 408, 410 (9th Cir. 1976); *Powers of Indian Tribes*, 55 Interior Dec. 14, 48-50 (1934).

At the same time, Congress has the power to legislate with respect to tribal use and occupancy of reservation

lands. See *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903); *Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 656 (1890). Congress may, consistent with constitutional limitations (*United States* v. *Sioux Nations of Indians*, 448 U.S. 371, 415 (1980)), grant interests in Indian lands, including rights-of-way. *Nadeau* v. *Union Pac. R.R.*, 253 U.S. 442, 446 (1920); *Missouri, K. & T. Ry.* v. *Roberts*, 152 U.S. 114, 116-117 (1894). But, in construing any statute dealing with the alienation of interests in Indian lands, we cannot lightly assume that Congress meant to dispense with tribal concurrence. And, at all events, the statutory requirements must be strictly followed. See *Southern Pacific Transportation Co.* v. *Watt*, 700 F.2d 550, 552, 556 (9th Cir.), cert. denied, No. 83-180 (Nov. 7, 1983).

A. Prior to Enactment of the FPA, Section 8 of MIRA Provided the Exclusive Method for Obtaining Rights-Of-Way Across Mission Indian Reservations for Water Conveyance Facilities

In the 1890's and early 1900's, Congress enacted a series of statutes authorizing rights-of-way across the public domain for various purposes. Some of these provisions applied generally to federal lands, whether reserved for special purposes or held as public lands.[46] Other statutes were directed specifically to granting rights-of-way across Indian reservations.[47] In either case, when the right-of-way affected an Indian reserva-

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[46] See, *e.g.*, Act of Mar. 3, 1891, ch. 561, § 18, 26 Stat. 1101 (former 43 U.S.C. 946) (right-of-way for reservoirs, canals, and laterals); Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 *et seq.* (former 43 U.S.C. 959) (right-of-way for electrical plants, poles and lines for the generation and distribution of electrical power, and for other purposes); Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253 (former 43 U.S.C. 961) (right-of-way for electrical poles and lines for the transmission and distribution of electrical power, and for other purposes).

[47] See, *e.g.*, Act of Mar. 3, 1901, ch. 832, § 4, 31 Stat. 1084, 25 U.S.C. 311 (highways); Act of Mar. 2, 1899, ch. 374, § 1, 30 Stat. 990, as amended, 25 U.S.C. 312 (railway, telegraph, and telephone lines).

tion, authority to make the grant almost invariably was vested in the Secretary of the Interior. Until 1948, there was no general statutory requirement of tribal consent. That year, Congress enacted a general Indian right-of-way statute, 25 U.S.C. 323 *et seq.*, which consolidated the authority of the Secretary of the Interior to grant rights-of-way across Indian lands (25 U.S.C. 323) and required the consent of most tribes[48] prior to the grant of a right-of-way across tribal lands (25 U.S.C. 324).[49] By regulation, the Secretary now requires the consent of all tribes to the granting of rights-of-way over tribal lands. See 25 C.F.R. 169.3(a).

The Mission Indian Relief Act of 1891 represents an exception to the general proposition that tribal consent to rights-of-way was not statutorily required prior to 1948. Section 8 of MIRA, 26 Stat. 714, authorizes rights-of-way across Mission Indian reservations for only two purposes: water conveyance facilities and railroads. With regard to the former, Section 8 provides that, prior to the issuance of a trust patent for a reservation,[50] the Secretary of the Interior is authorized to grant rights-of-way across the reservation for the construction of water conveyance facilities, but only upon the condition that the Indians owning the reservation "shall * * * be supplied with sufficient quantity of water for irrigating and domestic purposes" (26 Stat. 714). After issuance of any tribal patent, the power to grant a right-of-way is vested directly with the Band:

> Subsequent to the issuance of any tribal patent, or of any individual trust patent * * *, any citizen of

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[48] Principally, those tribes organized under the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*

[49] The 1948 Act supplemented, but did not repeal, prior existing statutes, including the FPA, which authorized rights-of-way across Indian reservations (25 U.S.C. 326).

[50] Section 1 of MIRA created a commission to select lands suitable for a reservation, after which a trust patent would issue to the Band for the reservation lands, pursuant to Section 3 (26 Stat. 712).

> the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

26 Stat. 714.[51]

In *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, Nos. 69-217-S, 72-276-S, and 72-271-S (S.D. Cal. Jan. 10, 1980),[52] the district court found that "MIRA was an attempt by Congress to deal in a comprehensive fashion with the historical problems that the Mission Indians had experienced in securing reservation lands

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[51] Section 8 was not included in the early drafts of MIRA. Its history is partially described in H.R. Rep. 3282, *supra*, at 3. A company had applied for a right-of-way for a ditch across an existing reservation in southern California. The local Indian agent thought the proposal would benefit the Indians, but the Commissioner of Indian Affairs, relying on two opinions of the Attorney General, 18 Op. Att'y Gen. 563 (1887), and 16 Op. Att'y Gen. 552 (1880), replied that there was no statutory authority for granting canal rights-of-way. The Commissioner therefore proposed amending the pending bill to confer authority for granting rights-of-way across the reservations for water conveyance facilities and for short railroad lines. Before the amendment was adopted, the bill died.

The bill was reintroduced in the next Congress, and the Commissioner's amendment was added as a new provision, Section 8, on the House floor. 22 Cong. Rec. 311-313 (1890). In conference, the Senate conferees agreed to the House amendment with the addition of a clause requiring pre-patent secretarial grants of canal rights-of-way to be subject to the condition that the Indians be supplied with a sufficient quantity of water for irrigation and domestic purposes. *Id.* at 554. The House conferees explained that this modification would "better serve and protect the rights and privileges of the Indians in and to their reservation lands." Congress then passed the bill. *Id.* at 786.

[52] Copies of this opinion have been lodged with the Clerk of the Court. See note 3, *supra*.

free from encroaching white settlers" (slip op. 3). The court concluded (slip op. 11) that Section 8 of MIRA was the "exclusive means" for obtaining canal rights-of-way across Mission Indian Reservations.[53] The court explained (slip op. 11):

> MIRA's lengthy legislative history reveals that Congress' primary concern in enacting the statute was to safely secure reservation lands for the Mission Indians. The statute sets forth comprehensive procedures for establishing and securing the reservations. Section 8 is properly read as a section designed to protect and preserve the integrity of the reservations once established by creating a specific procedure for permitting others to use Mission Indian lands.

Petitioners argue (Br. 23-26) that Section 8 of MIRA is not the exclusive method for obtaining canal rights-of-way across the Mission Indian Reservations, citing Interior's alleged prior administrative practice. That administrative practice, however, is not entitled to any weight because it did not focus on the effect of Section 8.

Petitioners rely upon a 1908 permit pursuant to 43 U.S.C. 946 granting canal rights-of-way across the reservations (C.A. App. 472), a 1914 contract granting rights-of-way for power generation and transmission purposes (J.A. 22), and the Commission's issuance of the original license for Project No. 176 in 1924 and subsequent license amendments. There is no evidence, however,

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[53] The district court therefore held that an 1894 contract (J.A. 9-13) that purported to grant a right-of-way across the Rincon Reservation and to limit the Rincon's water rights, was void ab initio for failure to comply with Section 8 of the MIRA. It also held that a 1908 right-of-way permit from Interior was also invalid because it did not comply with Section 8. Although unrelated to Section 8, the court also held that portions of a 1914 contract (J.A. 22-27) between the United States and Mutual and a 1922 contract (J.A. 28-38) between the United States and Vista's predecessor were void ab initio to the extent that they purported to convey or to limit the Bands' water rights (slip op. 24-25).

that when Interior granted the 1908 permit, it considered the effect of Section 8 of MIRA.[54] The grant of rights-of-way for power transmission purposes in the 1914 contract likewise has no bearing on the applicability of Section 8 to water conveyance facilities because Section 8 does not purport to cover electric transmission lines. Finally, petitioners do not cite any evidence that the Commission or Interior considered the relationship between Section 8 of MIRA and the FPA at any time prior to the initiation of this proceeding in 1969.

Because no agency has ever "focus[ed] closely on the operative impact" of Section 8 of MIRA, prior administrative practice is of no assistance in assessing the application of that statute in this case. *Weinberger* v. *Salfi*, 422 U.S. 749, 760 n.6 (1975). See *SEC* v. *Sloan*, 436 U.S. 103, 117-118 (1978).

B. The FPA Did Not Repeal Section 8 of MIRA

Section 8 of MIRA is a specific statute governing rights-of-way for water conveyance facilities across the Mission Indian reservations of California. It was enacted for the express purpose of securing for the Bands a "sufficient quantity of water for irrigating and domestic purposes" (26 Stat. 714). Congress sought to achieve this objective by requiring the Bands' consent to any rights-of-way for water conveyance facilities across their reservations. As we have noted, the provision was designed to prevent non-Indians from encroaching on Mission Indian lands and from stealing Indian water. See pages 2-3, 45-46, *supra*. Presumably, coercive or improvident arrangements would be avoided if both tribal consent and Secretarial approval were required for the granting of canal rights-of-way.

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[54] *Rio Verde Canal Co.*, 27 Interior Dec. 421 (1898), and *United States* v. *Portneuf-Marsh Valley Irrigation Co.*, 213 F. 601 (9th Cir. 1914), relied upon by petitioners (Br. 24 n.37), did not consider the interplay between 43 U.S.C. 946, a general statute, and Section 8 of MIRA, a specific statute.

In sum, Section 8 of MIRA is a very limited statute addressing a particularized situation with a specific remedy, geographically confined to one small group of Indian reservations in a single state. On the other hand, the FPA is a general statute that authorizes water power development throughout the Nation. As this Court has previously noted, it is a basic principle of statutory construction that a "statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Repeals by implication are not favored in any case. See *United States* v. *United States Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). But that "cardinal rule" has special force in circumstances like those presented here. Unless it is unavoidable, "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974).[55]

It is beyond question that the primary purpose of Project No. 176 is to convey water, not to produce power. This crucial fact was recognized by the administrative law judge (J.A. 357-366), by the Commission (Pet. App. 132) and by the court of appeals (*id.* at 13), and was virtually conceded by petitioners (J.A. 360-361). That is, of course, the special focus of Section 8 of MIRA: under what conditions should water conveyance facilities be

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[55] The Court explained the reason for this rule:

> "[W]hen the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

Radzanower, 426 U.S. at 153 (quoting T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 98 (2d ed. 1874)).

permitted on Mission Indian reservations. In this context, only the clearest indication that Congress so intended would justify disregarding the very specific requirement of tribal consent so pointedly enacted in MIRA.

There is, in fact, no reason whatever to read the FPA as a partial repeal of Section 8 of MIRA. Section 29 of the FPA, 16 U.S.C. 823, is of no assistance in this inquiry, because it does not mention, let alone expressly repeal, Section 8 of MIRA. It only repeals all earlier acts that are "inconsistent" with the FPA. And there is no tension—much less any irreconcilable conflict—between the MIRA requirement of tribal consent for canal rights-of-way and the jurisdiction given to the Commission by the Power Act. Of course, after enactment of the FPA, neither the Mission Indians nor the Secretary could any longer authorize water power projects on reservation lands by simple contract. Henceforth, a Commission license was also required. But there is no ground to suppose the new requirement was meant to erase the older condition of tribal consent. Obviously, the two provisions can co-exist.

Section 4(e) of the Power Act indicates no contrary legislative intent. Authorizing the Commission to issue licenses for project works upon reservations, including Indian reservations, logically does not preclude tribal consent where Congress has previously legislated such a requirement. Indeed, as the court of appeals concluded, the insistence of Section 4(e) that "the license will not interfere or be inconsistent" with the reservation's purpose "would be meaningless if Congress meant to extinguish preexisting Indian rights wherever they came into conflict with the Commission's comprehensive jurisdiction over power projects on federal lands" (Pet. App. 21, citing *Lac Courte Orielles Band of Lake Superior Chippewa Indians* v. *FPC*, 510 F.2d 198, 210-212 (D.C. Cir. 1975)).

The legislative history of the FPA cited by the Commission (Br. 27) and petitioners (Br. 14-16) is no more persuasive. A proposed amendment would have required

tribal consent to the use of reservation lands for power projects in the case of Indians whose reservations were created by treaty. See 59 Cong. Rec. 1564 (1920). Although initially adopted by the Senate, the amendment was deleted in conference. See H.R. Rep. 910, 66th Cong., 2d Sess. 8 (1920). In deleting this amendment, however, Congress merely rejected adding a *new* requirement that would have "singled out" water power from all other uses of reservation lands for tribal consent (*ibid.*).[56] It hardly follows that Congress also meant to extinguish already existing consent requirements under other laws, applicable to non-treaty reservations, like those of the Mission Indians.

In sum, there is no evidence of a "clear and manifest" intent by Congress to repeal Section 8 of MIRA. In addition to complying with the FPA, therefore, petitioners must also obtain the consent of the Bands whose reservations are traversed by its water conveyance facilities.

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[56] Because the amendment passed the Senate and was only deleted in conference, the views expressed during the Senate debates by opponents of the amendment are entitled to little, if any, weight in assessing Congress's intent in rejecting the amendment. In other words, the legislative history marshalled by petitioners and the Commission cannot carry the day, because its significance is apparent only "through strained processes of deduction from events of wholly ambiguous significance, [which] furnish dubious bases for inference in every direction." *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945). Instead, the Conference Report, which "represents the final statement of terms agreed to by both houses [is], next to the statute itself[,] * * * the most persuasive evidence of congressional intent." *Demby* v. *Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981) (MacKinnon, J.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1984

APPENDIX

STATUTES INVOLVED

1. The Federal Power Act, 16 U.S.C. 791a *et seq.*, provides in pertinent part:

a. Section 3(2), 16 U.S.C. 796(2):

> (2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks[.]

b. Section 4(e), 16 U.S.C. 797(e):

> The Commission is authorized and empowered—
>
> * * * * *
>
> (e) * * * To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided:

Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

c. Section 10(a) and (g), 16 U.S.C. 803(a) and (g):

All licenses issued under this subchapter shall be on the following conditions:

(a) * * * That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

(g) * * * Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

d. Section 18, 16 U.S.C. 811:

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon

conviction thereof shall be punished as provided in section 825o of this title.

e. Section 23(b), 16 U.S.C. 817:

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam

or other project works in such stream upon compliance with State laws.

f. Section 29, 16 U.S.C. 823:

All Acts or parts of Acts inconsistent with this chapter are repealed: *Provided*, That nothing contained herein shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights-of-way to the city and county of San Francisco, in the State of California.

2. The Mission Indian Relief Act, ch. 65, 26 Stat. 712 *et seq.*, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.

SEC. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior. They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by

said commissioners subject in each case to the approval of the Secretary of the Interior. In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed. And the said commission is hereby authorized to employ a competent surveyor and the necessary assistants.

SEC. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty but patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided*, That no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time

thereafter. Any such person shall be permitted to exercise the same right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent, in similar form, may be issued for any tract or tracts at any time after the appraised value of the improvements thereon shall have been paid: *And provided further*, That in case any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine: *And provided further*, That said patents declaring such lands to be held in trust as aforesaid shall be retained and kept in the Interior Department, and certified copies of the same shall be forwarded to and kept at the agency by the agent having charge of the Indians for whom such lands are to be held in trust, and said copies shall be open to inspection at such agency.

SEC. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one

years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

SEC. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

SEC. 6. That in cases where the lands occupied by any band or village of Indians are wholly or in part within the limits of any confirmed private grant or grants, it shall be the duty of the Attorney-General of the United States, upon request of the Secretary of the Interior, through special counsel or otherwise, to defend such Indians in the rights secured to them in the original grants from the Mexican Government, and in an act for the government and protection of Indians passed by the legislature of the

State of California April twenty-second, eighteen hundred and fifty, or to bring any suit, in the name of the United States, in the Circuit Court of the United States for California, that may be found necessary to the full protection of the legal or equitable rights of any Indian or tribe of Indians in any of such lands.

SEC. 7. That each of the commissioners authorized to be appointed by the first section of this act shall be paid at the rate of eight dollars per day for the time he is actually and necessarily employed in the discharge of his duties, and necessary traveling expenses; and for the payment of the same, and of the expenses of surveying, the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated.

SEC. 8. That previous to the issuance of a patent for any reservation as provided in section three of this act the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such other terms as he may prescribe, and may grant a right of way for rail or other roads through such reservation: *Provided*, That any individual, firm, or corporation desiring such privilege shall first give bond to the United States, in such sum as may be required by the Secretary of the Interior, with good and sufficient sureties, for the performance of such

condition precedent to the granting of such authority: *And provided further*, That this act shall not authorize the Secretary of the Interior to grant a right of way to any railroad company through any reservation for a longer distance than ten miles. And any patent issued for any reservation upon which such privilege has been granted, or for any allotment therein, shall be subject to such privilege, right of way, or easement. Subsequent to the issuance of any tribal patent, or of any individual trust patent as provided in section five of this act, any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

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